Supreme Court, U. S.
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80-909

No.

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA

v.

ERNESTO TERCERO, PETITIONER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the Speedy Trial Act compel dismissal of this prosecution when the provisions of the Speedy Trial Act, 18 U.S.C. 3161, were not specifically referred to in the pre-trial motion to dismiss filed in this matter?

2. Does the defendant's Sixth Amendment right to a speedy trial compel the dismissal of this prosecution?

3. Did the trial court err in refusing to determine whether the defendant could be impeached by a prior conviction if he testified; was the defendant's constitutional right to testify denied?

4. Does the government's intentional destruction of photographic evidence mandate reversal of this conviction?

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OPINION BELOW

The January 18, 1980 opinion of the United States Court of Appeals for the Ninth Circuit is attached hereto as Appendix A; the August 4, 1980 amendment of opinion and denial of petitioner's motion for rehearing is attached hereto as Appendix B.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1980. A timely petition for rehearing was denied and the original opinion amended by order filed August 4, 1980. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Does the Speedy Trial Act compel dismissal of this prosecution when the provisions of the Speedy Trial Act, 18 U.S.C. 3161, were not specifically referred to in the pre-trial motion to dismiss filed in this matter?

2. Does the defendant's Sixth Amendment right to a speedy trail compel the dismissal of this prosecution?

3. Did the trial court err in refusing to determine whether the defendant could be impeached by a prior conviction if he testified; was the defendant's constitutional right to testify denied?

4. Does the government's intentional destruction of photographic evidence mandate reversal of this conviction?

STATEMENT

A. JURISDICTION

The defendant was charged by Indictment dated January 22, 1975 in the Federal District of Arizona with possession of marijuana with the intent to distribute it in violation of 21 U.S.C. 841 (a) (1) (b). On January 19, 1976 the indictment was dismissed. On May 12, 1976 a superceding indictment was returned alleging the same offense. A trial on July 13, 1976 resulted in a hung jury. Later that month, Tercero's counsel and the United States Attorney stipulated that the instant case should be continued "until after the Minnesota case (federal) is completed. At that time a new decision will be made regarding whether or not this case will be retried." On January 12, 1978 the federal district court in Minnesota dismissed the charges pending there against Tercero. On February 6, 1978 the federal district court in Arizona ordered the matter set for trial. A retrial took place on March 9, 10 and 13, 1978 at which time Tercero was found guilty and thereafter given a sentence of five years imprisonment. The judgment and commitment were signed on April 17, 1978. The defendant was released on his own recognizance pending appeal and is presently at liberty on thirty thousand dollars bond.

B. STATEMENT OF FACTS

1. Events Leading to Arrest

On November 4, 1974 one or more individuals transacted the sale of marijuana to a federal undercover agent, Kent Florence. The attempted sale and some negotiations regarding the purchase of the marijuana took place in a house and garage located

at 9838 North 34th Lane in Phoenix, Arizona. The agent was negotiating with numerous Mexican-Americans. After observing marijuana, Florence summoned other federal agents to arrest all parties involved. However, some occupants of the house escaped.

The residence was rented by the defendant's brother, Tony Tercero. Tony Tercero has been in military service in Vietnam for three years. He had returned to Ft. Lewis, Washington and in October, 1974 he sent his family back to Phoenix. During October, Tony came to Phoenix and met two individuals, Eddie and Louis, at a local bar patronized primarily by Mexican-Americans. Tony did not have sufficient funds to acquire housing. Eddie and Louis offered to furnish Tony with funds to rent a house if they would be permitted to use the house until Tony was discharged from the army. Tony agreed. Using these funds, Tony's wife rented the house at 9838 North 34th Lane and Tony turned the keys over to Eddie and Louis

On November 2, 1974 Tony was honorably discharged from the service and returned to Phoenix. He spent the night of November 2 at the home of his brother, Ernie. On the evening of November 3, Tony, his wife and children who had been staying at his mother-in-law's house, went to take possession of his new house. At that time, Eddie and Louis were still there. At approximately one o'clock in the morning of November 4, Ernie Tercero came to Tony's house. Nothing in the record below indicates that the defendant had ever been there on any prior occasions.

At this point, the remaining evidence conflicts. Agent Florence arrived at the premises at approxi-

mately the same time that the defendant arrived. Florence testified that he had been negotiating for the purchase of marijuana with certain intermediaries and that about midnight, November 3, 1974, he met with a Mr. Vazquez and a person named Kolasa. The defendant's name had never been mentioned.

Vazquez took Florence to the house which had been rented by Tony. Vazquez testified that he was procuring a buyer for marijuana which was being sold by Eddie and Louys.

Florence testified that he went to the door of the house and met a person in a white T-shirt and jeans who was introduced to Florence by Vazquez as "Ernie," whom he indentified as the defendant. However, Vazquez testified that he did not know the defendant, Tercero. Vazquez testified that he introduced agent Florence to Eddie, not Ernie.

Florence testified: the defendant and Vazquez led him to a garage where there was a considerable amount of marijuana; the defendant instructed him to get his car and bring it in for loading; he proceeded to back his car into the garage while being followed by another agent; As he was backing in, someone started to lower the door of the garage and he stopped the garage door with his car.

At the first trial, Florence testified that Tony closed the door; in a report prepared after the incident he stated that the defendant, Ernie, closed the door; at this trial, he was not sure who closed the door. It should be noted that agent Florence admitted during the course this trial that he had *no* independent recollection of any of the facts of this case and that he relied exclusively on his report prepared after this incident for his trial testimony.

Florence testified that after entering the garage, he arrested Vazquez and the defendant, Ernie.

Florence testified that, during the period of time in which he had traveled through the house to the garage, he noticed two or three other Mexican males. It is uncontroverted that Eddie and Louis are two of these persons. Florence also testified that while Vazquez, the defendant and he were in the garage, either two or three Mexican males (the persons he had seen in the house) also entered the garage.

Agent Florence testified variously that he did not remember whether Tony Tercero was in the garage and also, that he did remember that Tony Tercero was in the garage. Florence did recall that two or three Mexican males escaped from the garage when other agents arrived.

Florence testified that the defendant was wearing a white T-shirt and jeans that night. However, on cross-examination, he admitted that he had no independent recollection of what the defendent was wearing; his testimony was influenced by a photograph of the defendant allegedly taken on the night he was arrested. Florence also testified that there were other photographs of the defendant taken on the night of the arrest but that these photographs had been intentionally destroyed by the Government. Florence did not know whether the destroyed photographs were identical to the photographs admitted into evidence.

The defendant's brother, Tony, testified concerning the night of the arrest. His testimony is uncontroverted that his brother, the defendant, had never been to the residence prior to this night and had only been at the residence for approximately fifteen to

thirty minutes prior to Florence's arrival. Tony intended to drive the defendant home in Tony's car which the defendant had just returned to him. Just before they were ready to leave, the doorbell rang and Vazquez and Florence arrived. After Florence and Vazquez had entered and been in the house for a few moments, Tony told the defendant to go ahead and take Tony's car home. The defendant started to exit through the garage and was in the process of pulling down the garage door when Florence drove his car under the door. At this time, Eddie and Louis, the other Mexican males seen by Florence, were standing in the garage. When Florence got out of his car and displayed his badge and gun, the lights were turned out by someone and Eddie and Louis fled from the garage.

Vazquez, Kolasa and Fife (having pled guilty to charges stemming from this transaction) all gave uncontroverted testimony that they arranged for agent Florence to purchase the marijuana. These three witnesses testified that the defendant was not involved in this marijuana transaction.

Kolasa testified that his source for the marijuana to be sold to Florence was from Vazquez. Vazquez testified that his source was two Mexican males named Eddie and Louis.

The case thus boils down to a problem of identification—did agent Florence deal with the defendant or with Eddie?

Florence demonstrated during the course of his testimony in these two trials a remarkable ability to confuse the identities of the various persons involved. Florence contradicted himself on numerous occasions concerning who he was introduced to, who was

in the garage, who closed the garage door, and who was the source of the marijuana.

Even the government concluded that Florence had been impeached during the first trial by statements he had made, which in the government's own language, "contradicted certain aspects of his trial testimony of July 13, 1976...*The impeachment created an issue as to the identity of the persons Florence negotiated with at the house.*" (Emphasis added).

There are two important factors relating to this identity problem as to which the petitioner here seeks review: the defendant's testimony, and the pictures of the defendant taken on the night of arrest.

2. Procedural Problems at Trial

As previously noted, the alleged criminal activity occurred November 4, 1974 and the defendant was indicted January 2, 1975. Yet, the conviction came more than three full years later. The question presented is whether this time sequence taints the conviction.

The defendant's original trial was scheduled for June 24, 1975. Illness of counsel, substitution, and a requested continuance by the defendant carried the trial over to January 23, 1976. (R. 63). On January 19, 1976 the indictment was dismissed. On May 12, 1976 a superceding indictment was returned against Tercero. The trial was set for July 13, 1976 and this trial resulted in a hung jury.

As noted, the defendant's counsel and United States Attorney stipulated that this trial be continued until after the federal charges in Minnesota were completed. Thereafter, as has been noted, the charges in Minnesota were dismissed and a new

trial date was scheduled in the district of Arizona which resulted in this conviction.

Tercero's counsel at the time of the making of the stipulation was Lawrence Debus, a respected member of the Phoenix criminal Bar. Debus did not clear this stipulation with his clients before it was made and proceeded wholly on his own.

As to the identity problem, it should be noted that several photographs were taken of the defendant on the night of his arrest. Only one such photograph was introduced in evidence; the others were intentionally destroyed by the government.

The government, through agent Florence's testimony, made much of the fact that Vazquez talked to a man dressed in a white T-shirt and jeans while Florence waited in a car and that Florence was eventually introduced to a man in a white T-shirt and jeans; this is the man who allegedly attempted to sell the marijuana to Florence.

A photograph of the defendant admitted into evidence depicts him in a white T-shirt. However, it is unlikely that anyone would be dressed in only a T-shirt, since there is uncontroverted testimony that it was chilly during the early morning hours of November 4, 1974. Moreover, there was no testimony concerning when or where the photographs were taken, whether at the arrest scene, at booking or at the Maricopa County Jail after jail T-shirts and blues had been exchanged for the prisoner's clothing.

The third problem encountered at the trial level concerns the application of Rule 609 of the Federal Rules of Evidence. The defendant has a prior conviction from February, 1971 for the unlawful sale of a narcotic drug. In the first trial, defense counsel

moved for a ruling in limine from Judge Muecke that this prior conviction not be used for impeachment. The notion was granted and in light of that ruling, Tercero testified. As previously noted, there was a hung jury. We are told by Tercero's prior counsel, Mr. Debus, that a majority of that jury voted not to convict.

In these circumstances, at the second trial, Tercero's counsel inquired of the court "whether the government would be allowed to impeach Mr. Tercero with his prior felony conviction of the sale of heroin." Counsel let the court know that Tercero has previously testified and would testify in this case as he had testified in the prior proceeding. The court refused to make such a ruling. Counsel then asked if the witness could testify under oath outside the presence of the jury so that the court would make a determination as to whether he could be impeached by the prior conviction. The trial court rejected this, saying:

> "I am well aware of the Lukes (sic) case and I am well aware of the Gordon case and I am well aware of a 9th Circuit case that they wouldn't follow either one of them. And I am well aware of the Rules of Evidence 609 and I know what it said and until I hear him get on the stand and testify about the whole business I don't know whether I would exercise my discretion and which way I would exercise it."

In these circumstances, the defendant did not testify on his own behalf. Here, unlike his prior trial, the defendant was convicted.

ARGUMENT

I

DOES THE SPEEDY TRIAL ACT COMPEL DISMISSAL OF THIS PROSECUTION EVEN THOUGH THE SPEEDY TRIAL ACT, 18 U.S.C. 3161, WAS NOT SPECIFICALLY REFERRED TO IN THE PRE-TRIAL MOTION TO DISMISS FILED IN THIS MATTER

The Ninth Circuit Court of Appeals ruled at Section Two of its opinion that Tercero's claim that delay constituted a violation of the Speedy Trial Act, 18 U.S.C. 3161, *et seq.*, was not properly before the Circuit because Tercero failed to raise this claim in the District Court. In Footnote Six of its opinion, the Ninth Circuit notes that although Tercero filed a timely motion to dismiss for violation of his right to speedy trial, he never specifically mentioned the Speedy Trial Act and, therefore, the Circuit rules, has waived his right to the Act's protection.

Beyond any doubt, the Speedy Trial Act was violated. 18 U.S.C. 3161 (h) (8) (A).

The Ninth Circuit ignores this violation on the grounds that the defendant did not raise the issue by specifically referring to the Speedy Trial Act in his pre-trial motion to dismiss.

Under Rule 52 (B) of the Federal Rules of Criminal Procedure, "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." This is plain error. And where, as here, the error could not be corrected by any action of the trial courts, such as an instruction, the error rises to the level of plain and

fundamental error. *United States v. Garber*, 471 F. 2d 212 (5th Cir., 1972).

It is generally stated that an error is sufficient to require reversal where it might have operated to the substantial injury of the defendant. *United States v. Grady*, 185 F. 2d 273 (7th Cir., 1950). The test is often stated to be whether the error is "obvious" and "substantial." *United States v. Brown*, 555 F. 2d 407 (5th Cir., 1977), *cert. denied* 98 S. CT. 1448.

The error complained of here is the ultimate prejudice since it constitutes the difference between trial and no trial. 18 U.S.C. 3161 (h) (8) (A) concerns itself with the tolling of time limitations prescribed by the Speedy Trial Act. This section provides for the exclusion of time "at the request of the defendant or his counsel, but only if the judge grants such continuance on the basis of his findings that the ends of justice served by taking such action outweighed the best interests of the public and the defendant in a speedy trial." The statute mandates that such findings be set forth by the trial court "either orally or in writing." Here there were no findings at all. The statute has thus been violated. The time between trial 1 and trial 2 is not excluded and both 18 U.S.C. 3161 (c) and (e) have been violated. All charges should be dismissed. *Strunk v. United States*, 412 U.S. 434, 93 S. Ct. 2260, 37 L. Ed. 2d 56 (1973).

II

DOES THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL COMPEL A DISMISSAL OF THIS PROSECUTION

In the circumstances before this court, the defend-

ant simply did not have a speedy trial. He was indicted in January, 1975 and tried for the first time in July, 1976. This trial ended in a hung jury. The defendant was not tried again thereafter until March, 1978.

Tercero does not claim any denial of his right to a speedy trial up through the first trial on July, 1976. The delays occasioned there were due to illness, changes in defendant's counsel and were for the convenience of the defendant.

However, the second trial presents a different question. As previously noted in the Statement of Facts, the defendant had criminal law problems in the federal district court in the State of Minnesota. By stipulation, without the defendant's consent or knowledge, the Arizona trial was set off until some disposition occurred in the Minnesota trial. Shortly after the Minnesota district court dismissed the action in favor of the defendant (but while the appeal was still pending), the matter was set for trial in the district court of Arizona.

There are several flaws in this procedure:

A. As previously noted, defendant's counsel who agreed to the postponement testified that he did not have authority from his client to make such an arrangement. Moreover, the defendant testified that he had over a long period of time requested that his counsel "hurry up, and get it over with."

The right to a speedy trial is a constitutional right. U.S. Const., 6 Amend. In *Klopfer v. State of North Carolina,* 386 U.S. 213, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967) this court held that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment.

Since the right to a speedy trial is a fundamental right, it cannot be waived solely by counsel without the consent of his client. *Fay v. Noia*, 372 U.S. 391, 439, 83 S. Ct. 822, 849, 9 L. Ed. 2d 837 (1963) (counsel cannot waive the right to appeal without the consent of his client). *See Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 1711-12, 23 L. Ed. 2d 274 (1969) (only the defendant can enter a quilty plea and waive constitutional rights inherent in trial; *Patton v. United States*, 281 U.S. 276, 312, 50 S. Ct. 253, 263, 74 L. Ed. 854 (1930) (only the defendant can waive rights to jury trial).

B. The defendant's Sixth Amendment right to a speedy trial was violated. The Ninth Circuit applied the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972) to this case as follows:

1. The court found that the twenty month period between Tercero's first and second trial is clearly adequate to invoke the *Barker* balancing analysis.

2. As to the reason for the delay, the Ninth Circuit held that the delay was pursuant to the stipulation entered into between the government and Tercero's counsel. The court held that while such delay was not a deliberate attempt to hamper the defense, "still it was not necessarily justified." The court did not find culpable government conduct but ruled that this factor should still weigh on the defendant's behalf.

3. As to the third factor, the defendant's assertion of his right, the court found that Tercero never suspected that he could be prosecuted again for his offense and that, therefore, his failure to assert the right does not count in the balance against him.

4. The court found no prejudice resulted as a result of the violation of the defendant's right. The court found that Tercero failed to show any prejudice to his ability to prepare an adequate defense. The court stated:

> "The only time-caused lapse of memory identified by Tercero is irrelevant because it was suffered by Florence, the key prosecution witness, and tended to undermine Florence's testimony concerning what Tercero wore on the night of his arrest."

In one sentence, the Ninth Circuit has identified both elements of prejudice which Tercero did suffer as a result of this violation. As previously noted, Florence was unable to independently recall any testimony other than that contained in his report. Tercero's counsel was thus required to attempt to cross-examine a hearsay document. Tercero was denied his Constitutional right to confront the key witness and suffered extreme prejudice in the circumstances of this case. It is impossible in this setting to effectively cross-examine and test the memory and veracity of a witness.

Further, Tercero was prejudiced because in the intervening period between the first and second trial, photographic evidence was intentionally destroyed by the government. The passage of time did not help the defendant undermine Florence's testimony concerning what Tercero wore on the night of his arrest. It merely destroyed his ability to question the witness's direct testimony and recollection. These factors totally destroyed Tercero's ability to demonstrate to the jury what he wore on the night of his arrest, especially in light of the court's failure to rule on the motion *in limine*.

Respectfully then, the Ninth Circuit is incorrect when they hold that "Tercero has not identified any evidence, spoken or otherwise, that was not produced at the second trial simply because of the passage of time."

The Ninth Circuit does note that the government "may have acted somewhat improvidently" in this matter. In view of the prejudice suffered by Tercero, the Ninth Circuit erred in not finding a violation of the defendant's Sixth Amendment right to a speedy trial.

III

THE TRIAL COURT ERRED IN REFUSING TO DETERMINE WHETHER THE DEFENDANT COULD BE IMPEACHED IF HE TESTIFIED; THE DEFENDANT'S CONSTITUTIONAL RIGHT TO TESTIFY WAS DENIED

Attached hereto and incorporated herein as Appendix C is a transcript of the relevant proceedings occurring on March 13, 1978 shortly before the conclusion of the defense's case. At that time, Tercero's counsel requested that the court rule *in limine* that the defendant's prior conviction for sale of narcotics be excluded should the defendant testify. Counsel for Tercero assured the court that Tercero wished to testify and indicated that pursuant to Rule 609 of the Federal Rules of Evidence, the prior conviction would be inadmissible. He also referred the trial court to Tercero's prior testimony given in his first trial which resulted in a hung jury in July, 1976. The trial court indicated that it had not read this testimony and further indicated that "until I hear him (the defendant) get on the stand and testify about the whole business I don't know whether

I would exercise my discretion and which way I would exercise it." The court went on to notice its impatience with the defendant by stating:

> "You said you were ready for trial. I am ready to hear it. I am going to finish this case today if he's not going to testify. If he is going to testify we may not be able to finish. So you go back and ask him whether he wants to testify or not."

A review of this transcript of proceedings (Appendix C) indicates that the trial court simply would not and had not read Tercero's prior testimony; was not interested in hearing what his testimony would be; and ordered the defendant to exercise his choice to testify or not without benefit of what the trial court's ruling would be.

Following the filing of appeal of this matter to the Ninth Circuit, the Ninth Circuit Court of Appeals decided *United States v. Cook*, 608 F. 2d 1175 (9th Cir. 1979).

The Ninth Circuit, in *Cook*, fundamentally changed the requirements of the law by holding that in cases such as the instant one the defendant must (1) establish on the record that he will in fact take the stand and testify if his challenged prior convictions are excluded; and, (2) sufficiently outline the nature of his testimony so that the trial court, and the reviewing court, can do the necessary balancing contemplated in Rule 609.

Tercero is entitled to a new trial under the rationale of *Cook*. The *Cook* court, while recognizing the discretion of the trial court, strongly encouraged the making of an advanced ruling on impeachment. 608 F. 2d at 1186.

In applying the two requirements of *Cook* to the instant matter, the following is apparent:

A. Requirement number two is fully met since this is a re-trial. Tercero had testified in the first trial and the trial judge simply refused to look at this testimony although the testimony was offered to him. It should be noted that the prior testimony of Tercero is only twenty two pages in length;

B. The record establishes that the defendant would have taken the stand and testified if the challenged prior convictions had been excluded. The Ninth Circuit, by way of its amended opinion filed August 4, 1980, rules as follows:

1. The decision as to whether an advanced ruling should be made by the trial court is committed to the discretion of the trial judge.

2. In this case, the Ninth Circuit does not decide whether the judge abused his discretion by refusing to rule in advance since Tercero did not demonstrate that he was prejudiced by the ruling. The court finds that Tercero, to demonstrate prejudice by the ruling, must show that he would have testified *but for* the court's refusal to rule in advance. The Ninth Circuit holds that the record indicates that, even if the court had ruled in advance that the prior convictions were inadmissible, Tercero would not have testified due to the existence of a potential rebuttal witness.

3. The court notes at Footnote Eight of its opinion that Tercero argued that the threatened rebuttal witness' testimony would have been inadmissible. The court holds that this is not relevant to the issues before the court since the issue is not the admissibility of the rebuttal testimony but rather the propriety of the trial court's refusal to rule in advance on that admissibility.

4. As to this issue, the court finds that the deci-

sion as to whether a court should rule upon the admissibility of a prior conviction in advance of the defendant's testimony rests within the sound discretion of the trial judge and further, that this rule is similarly true as to a rebuttal witness' impeachment evidence. Applying then the test for an abuse of discretion, the Ninth Circuit finds that there is not a sufficient showing of an abuse of discretion.

5. The court holds that because the trial court did not abuse its discretion in refusing to rule in advance upon the admissibility of the rebuttal witness' testimony, Tercero would, therefore, have not taken the stand in his own defense even if the court had ruled in advance to exclude the prior convictions evidence. The court then holds that Tercero cannot now claim he was prejudiced by the judge's refusal to rule on the admissibility of the prior conviction.

The Ninth Circuit has found it unnecessary to rule on the question of abuse of discretion of the trial court in refusing to rule on the admissibility of the prior conviction evidence because it found that "the record is clear that Tercero did not demonstrate, as he must, that he was prejudiced by the ruling." To this there are three responses: First, with all due respect, the court's statement as to the clarity of the record is incorrect; second, the court has created a required showing of the degree of prejudice by this decision which is greater than that required in the *Cook* decision; and, finally, the Platt-rebuttal testimony was clearly inadmissible and the court's refusal to rule that it was such serves independently as a basis for reversal.

1. The record indicates clealy that Tercero would have testified had the court ruled the prior convic-

tions to be inadmissible.

The Ninth Circuit states that "the record plainly reveals that even if the court had ruled in advance that the prior convictions were inadmissible, Tercero would not have testified due to the existence of a potential rebuttal witness." (Appendix p. 12a)

At the very least this is an overstatement since counsel was aware of the availability of the rebuttal witness' testimony more than one week prior to trial. The record also indicates that defense counsel knew that the court might admit this testimony.

Despite this knowledge, defense counsel stated that "it is anticipated that the defendant will testify on his own behalf" if the prior conviction was kept out and, subsequently, pressed vigorously both by written memorandum and orally for a ruling by the court. When the court subsequently refused to rule, counsel asked for a recess to discuss the matter with his client thus further indicating the importance of this matter to the defense. It was only after Judge Regan responded to this request for a recess with another demonstration of his impatience that defense counsel, without consulting with Tercero, asked if the same ruling would apply to the Platt rebuttal testimony.

The record clearly demonstrates that a favorable ruling on the prior conviction evidence was of paramount importance to the defense and further, that defense counsel was unwilling to put his client on the stand without that ruling.

B. A reading of the record indicates that Tercero was prejudiced.

Even under the above-stated interpretation of the record, the language in the Ninth Circuit's Opinion

differs substantially from the standard as set forth in *United States v. Cook, supra.* Judge Wallis' statement of the degree of prejudice that Tercero would have to show in this case is that "he would have testified *but for* the court's refusal to rule in advance." This standard requires a certainty that the majority in *Cook* acknowledged could never be shown. *See Cook, supra,* 608 F. 2d at 1184, note 6 ("one can never say with certainty that a specific defendant would have taken the stand even if evidence about prior convictions were excluded").

Moreover, none of the circuits cited and approved by the Ninth Circuit that have adopted the standard of *Cook* have imposed so rigorous a standard as that imposed by Judge Wallis in his opinion in *Tercero.* There is also no evidence that the *Cook* majority, having brought the Ninth Circuit "into line with the other circuits," by overruling the prior case law (608 F. 2d at 1192, Hufstedler, J., dissenting), intended to embark on a new digression.

Applying the standards as set forth in *Cook* would lead to the conclusion that Tercero did make a sufficient showing that he would have taken the stand had the evidence been excluded and what his testimony would have been.

C. The rebuttal witness' testimony was inadmissible and the refusal of the trial court to so rule was prejudicial.

The government in its trial memorandum notified the defense that Platt would testify that Tercero had attempted to sell him marijuana both before and after the date of this arrest. The government declared that it would prove by Platt's testimony "that evidence of the other acts tend to prove Ernest Tercero's

criminal participation in the indicted act." (R. 74, L. 20-21). Thus, the only difference between the prior conviction sought by the government and the Platt rebuttal testimony is that the one was a conviction and the other referred to alleged overt acts for which no charge has ever been brought.

In reviewing Footnote Eight of the Ninth Circuit's opinion in this matter, the essence of the opinion is that *Cook* is immaterial because Tercero would not have testified in any case because of the Platt hazard. The record demonstrates that this is simply not so.

But assuming, *arguendo,* that that be the fact, since the Platt testimony was so clearly inadmissible, Judge Regan committed reversible error in refusing to so rule.

When referring to the Platt testimony, Judge Regan stated, "I have no idea what Mr. Noyes is going to do." Since the government, and particularly Mr. Noyes, had clearly enumerated what it was going to do in its pre-trial memorandum, this is an odd ignorance. Moreover, when defense counsel notes that the government has notified the parties that if Tercero testifies, Platt is going to testify that Tercero has dealt marijuana with him, the court indicated that it will not give a ruling in anticipation of what somebody is going to do.

The trial court at this point is compounding errors. The court had been told in writing by the government that the government intends to call Platt for purposes of demonstrating that Tercero was involved in this marijuana transaction. At this point, the trial court can believe what he has read, he can ask the prosecuting attorney if this is still his intention, or

he can ignore the whole affair. He chose the latter and we think unfairly jeopardized the defendant in so doing.

Evidence of prior and subsequent transactions, even if established, is not proof of the particular transaction. Undoubtedly, such evidence may be relevant as where the defendant denies any knowledge that the material found in his truck is marijuana, *United States v. Rocha*, 553 F. 2d 615 (9th Cir. 1977), or where the defendant insists that he knows nothing about drugs, *United States v. Batts*, 573 F. 2d 599 (9th Cir. 1978).

Tercero never denied at his original trial that he had in the past sold drugs or that he knew what marijuana was. His defense was that he was not involved in this transaction. The only import of Platt's rebuttal testimony would be to convey to the jury that the defendant had engaged in this type of conduct at other times and, therefore, must have done it this time also. It is Horn Book law that no evidence may be introduced which seeks solely to prove that the accused has a criminal disposition. Weinstein's Evidence, §404 (08) at 404-40 (1979).

For all the aforementioned, it is respectfully submitted that the Ninth Circuit was in error and that this matter should be reversed regarding Judge Regan's refusal to rule regarding the admissibility of the prior conviction.

This court's attention is respectfully directed to *United States v. Oakes*, 565 F. 2d 170 (1st Cir. 1977). This case does not hold that a trial judge imperatively must rule on such questions in advance but it comes to the absolute brink of so holding and strongly recommends that this be the practice of

federal courts. Judge Weinstein in *United States v. Jackson*, 405 F. Supp. 938 (E.D.N.Y. 1975), declares that:

> "Trial courts should rule...as soon as possible after the issue has been raised." 405 F. Supp. at 942.

Thus, rulings such as this should be made as soon as possible after the issue has been raised and should be made in advance of the defendant's testimony if possible. On the other hand, it is obvious that such a ruling need not be made if the nature of the defendant's testimony is speculative so that a judge simply cannot be expected to decide the question.

Here, however, there was no speculation. The court had available to him what Tercero's testimony was to be. The trial court simply would not look at it.

The defendant has a constitutional right to testify in his own behalf as expressed in several opinions of this court.

In *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), it was noted:

> "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." 422 U.S. at 819, 95 S. Ct. at 2533.

This court went on to note that it is now accepted as a constitutional right that the accused has a right to testify in his own behalf. This recognition of the defendant's constitutional right to testify has also appeared in *Harris v. New York*, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971), wherein it was stated:

> "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. 401 U.S. at 225, 91 S. Ct. at 645.

Not only does the defendant have a constitutional

right to testify, but this right must be unfettered. In his dissent to *Harris, supra,* holding that a defendant could be impeached by a prior statement made despite an absence of Miranda warnings, Justice Brennan stated:

> "The choice of whether to testify in one's own defense must therefore be 'unfettered,' since that choice is an exercise of the constitutional privilege..." 401 U.S. at 230, 91 S. Ct. at 648.

Here, Tercero could not make an "unfettered" choice concerning whether to take the stand absent a ruling in advance as to whether he would be impeached by his prior conviction. His constitutional rights were, therefore, violated.

This is analogous to the situation confronted by this court in *Griffin v. State of California,* 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). *Griffin* held that the government cannot cut back on the defendant's privilege not to testify against himself by making the exercise of that privilege costly and permitting a prosecutorial comment upon the defendant's failure to testify.

The other side of that coin is presented here. Without an advanced ruling on the defendant's motion *in limine,* the government can cut back on the defendant's privilege to testify by making the exercise of that privilege costly through the threat of improper impeachment.

The situation is analogous to *Walder v. United States,*347 U.S. 62, 74 S. Ct. 354, 98 L. Ed. 503 (1954). This court held that a defendant could properly be impeached by evidence unlawfully seized from him on a prior occasion. However, this court further

noted there that:

> "(The defendant) must be free to deny all the elements of the case against him without thereby giving leave to the government to introduce by way of rebuttal evidence illegally secured by it, and therefore, not available for its case in chief." 347 U.S. at 65, 74 S. Ct. at 356.

Here, the defendant was not free to deny all the elements of the case against him because he had not been guaranteed that the government would not be allowed to impeach him improperly through his prior conviction. Here, unlike *Walder,* Tercero was not attempting to deny any of the facts related to his prior conviction.

This case hinges totally on identity. In that circumstance, the violation of the defendant's fundamental constitutional right to testify mandates a reversal of this conviction. The defendant's testimony was crucial to his defense and the prejudice of the court's failure to rule is, therefore, made greater.

IV

THE GOVERNMENT'S INTENTIONAL DESTRUCTION OF PHOTOGRAPHIC EVIDENCE MANDATES REVERSAL

As noted by the Ninth Circuit, when evidence is lost or destroyed while in the government's possession, the government bears the burden of justifying its conduct and the defendant bears the burden of demonstrating prejudice. *United States v. Loud Hawk,* —F. 2d—, No. 76-1906, No. 76-2127, (9th Cir. Aug. 7, 1979).

The basic thrust of the court's opinion below is that Tercero demonstrated no prejudice to his defense by virtue of this lack of photographic evidence.

However, the factual issue in this case is whether

the charge is aimed at the right Mexican-American. The government offered a picture corroborating the testimony of agent Florence that the man who had been observed negotiating to sell the marijuana and the man who sold the marijuana to him was wearing a white T-shirt. The photograph shows Ernest Tercero wearing a white T-shirt.

It is, therefore, difficult to comprehend the Ninth Circuit's statement that "the photographs sought by Tercero were neither central nor essential to his defense...at most, the additional photographs might have proved that, at or after his arrest, Tercero had removed a coat or changed clothes. Moreover, Florence had already admitted on cross-examination that he had no independent recollection of the clothing Tercero was wearing that night."

Once again, the Ninth Circuit has noted what "prejudice" is suffered as a result of the destruction of these photographs; Viz, that Tercero was not wearing a white T-shirt at the time of his arrest and was, therefore, the wrong Mexican-American; further, since Florence no longer had any independent recollection of the clothing Tercero was wearing that night, that Florence was wrong in identifying Tercero as the seller of the marijuana.

It is hard to conceive of evidence more essential or central to the defense of this matter.

It should be noted that agent Florence in the first trial testified that Tercero was outside the garage; in the second trial, he testified that Ernest Tercero was inside the garage and Tony Tercero outside. By the second trial, Florence no longer knew who closed the door, and further testified that at the time of trial he had no idea as to what the other individual Mexi-

cans looked like.

There were only two ways of checking the identity of the seller of this marijuana through the clothing:

A. Ernest Tercero could have testified. As previously noted, the trial court's ruling barred this.

B. Other photographs of the defendant on the night of the arrest could have been checked. However, not only were they gone, but agent Florence testified that he did not remember what those photographs demonstrated.

Issue is, therefore, taken with the Ninth Circuit's conclusion that Tercero has failed in his burden of demonstrating prejudice. Extreme prejudice was demonstrated and although the defendant is not able to demonstrate bad faith on the part of the government, in the peculiar factual circumstances of this case, a reversal is mandated.

CONCLUSION

The problem with this case is that the vehicle carrying Tercero to the penitentiary has made too many tight turns.

The factual issue is identification. The agent testifies so long after the incident that he has no independent recollection of the facts. To buttress his testimony, garnered only from his report, the government utilizes a photograph showing the defendant in a white T-shirt. Other photographs are demonstrated to have been intentionally destroyed by the government. Doubt exists as to whether this photograph indicates the defendant in Maricopa County prison garb which consists of a white T-shirt, or whether it is his clothing worn at the time of this incident.

The proceedings clearly violate the Speedy Trial Act. Yet, the Ninth Circuit decides that although a motion to dismiss was brought based on the Sixth Amendment, the Speedy Trial Act was not specifically mentioned and, therefore, it cannot be considered.

The defendant desires to testify regarding the identification issue. He has previously testified and his testimony resulted in a hung jury. Here, however, unlike the prior trial, the trial court refuses to rule on the admissibility of a prior conviction as impeachment. Therefore, without such a ruling, the defendant does not testify and a conviction is obtained.

When a judicial system countenances so many doubts in the course of its prosecution, the defendant ought to be very clearly guilty. To this day, we do not know whether Ernest Tercero is the right man.

This defendant should have either a dismissal under the arguments relating to speedy trial or a new trial. The questions presented are important enough, especially in this factual circumstance, to warrant the granting of Certiorari by this court.

RESPECTFULLY SUBMITTED this 25 day of November, 1980.

HOFFMAN AND BROWN,

DAVID S. HOFFMAN

David S. Hoffman

CERTIFICATE OF SERVICE

STATE OF ARIZONA)
) ss.
County of Pima)

I, DAVID S. HOFFMAN, hereby certify that on this 25 day of November, 1980, copies of the foregoing Petition for Writ of Certiorari were mailed to:

Michael Hawkins

Michael D. Hawkins
United States Attorney
District of Arizona

DAVID S. HOFFMAN

Wade H. McCree, Jr.
Solicitor General
Department of Justice
Washington, D.C. 20530

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 78-1995

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ERNESTO TERCERO, DEFENDANT-APPELLANT

Jan. 18, 1980

Appeal from the United States District Court for the District of Arizona.

Before GOODWIN and WALLACE, Circuit Judges, and HAUK,* District Judge.

WALLACE, Circuit Judge:

Tercero appeals his conviction for possessing marijuana with intent to distribute in violation of 21 U.S.C. 841 (a) (1). He contends that reversal is required due to the loss or destruction of certain photographs taken the night of his arrest, the denial of his right to a speedy trial, and the trial court's refusal to rule in advance on the admissibility, for impeachment purposes, of his prior conviction for the sale of heroin. We have held this case pending the *en banc* disposition of *United States v. Cook*, No. 76-3465 (9th Cir., June 29, 1979), and now affirm the conviction.

*Honorable A. Andrew Hauk, United States District Judge, Central District of California, sitting by designation.

In November 1974, a federal undercover agent,

Florence, arranged for the purchase of a large quantity of marijuana and agreed to take delivery of his purchase at a house inPhoenix, Arizona. He was taken to the house in the early morning hours of November 4, and was introduced at the door to a Mexican-American whom he later identified as Tercero. There were several other Mexican-Americans on the premises. The man who met him at the door led him through the house to the garage where he showed Florence several hundred pounds of marijuana. As Florence thereafter began to drive his automobile into the garage purportedly to load the marijuana, someone, apparently realizing that he was a federal agent, attempted to prevent his entry by closing the garage door. Florence then indentified himself as a federal agent, summoned back-up officers and Tercero and two others were arrested. Other persons in the house fled and escaped arrest.

Tercero was first tried on July 1976, but that trial resulted in a hung jury. At that trial, Tercero testified he was not involved in the sale or distribution of the marijuana stored at the house. He denied that he was the man who met Florence at the door, and he testified that he first saw Florence when Florence entered the living room where Tercero was sitting with his brother. He testified that he had not previously visited the house, which was rented by his brother, and had been there just a few minutes when Florence entered. Tercero's theory at the first trial was that Florence mistook him for "Eddie," who escaped while Florence was trying to apprehend the group. He also testified that he was leaving his brother's house when Florence arrested him. Defense

witness Vasquez and Tercero's brother Tony corroborated Tercero's version of the facts at the first trial. The only contested factual issue at that trial and in the subsequent trial that resulted in his conviction, is whether Tercero was the man who opened the door for Florence and ultimately showed him the marijuana.

I.

On the night that Tercero was arrested, he was photographed by the Maricopa County Sheriff's Department, the United States Marshal, and Drug Enforcement Administration (DEA). At the second trial, the government, without objection from Tercero's counsel, offered the Marshal's arrest photograph of Tercero wearing a white T-shirt. The photograph was introduced to corroborate Florence's testimony that Tercero was wearing a white T-shirt on the night of the arrest. At the close of Florence's testimony, Tercero requested copies of the photographs taken by the Sheriff's Department and the DEA. He claimed that these photographs would show him wearing heavier clothing on the night of the arrest. The government stated that the other photographs were missing. While no explanation was offered for the missing DEA photograph, the government did state that the County had destroyed its photograph as a matter of routine file-cleaning. Tercero then moved to dismiss the indictment on the ground that the government had lost or destroyed material evidence. He urges that the district court erred by denying his motion.

When evidence is lost or destroyed while in the government's possession, "the Government bears

the burden of justifying its conduct and the defendant bears the burden of demonstrating prejudice." *United States v. Loud Hawk*, Nos. 76-1906, 76-2127, slip op. at 2872 (9th Cir., Aug. 7, 1979) (en banc).[1] Among the factors to be considered in weighing the culpability of the government's conduct are

> whether the evidence was lost or destoyed while in its custody, whether the Government acted in disregard for the interests of the accused, whether it was negligent in failing to adhere to established and reasonable standards of care for police and prosecutorial functions, and, if the acts were deliberate, whether they were taken in good faith or with reasonable justification...It is relevant also to inquire whether the government attorneys prosecuting the case have participated in the events leading to loss or destruction of the evidence, for prosecutorial action may bear upon existence of a motive to harm the accused.

Id.

Tercero concedes that there is no evidence that the government's loss or destruction of the photographs was in bad faith. Furthermore, there is no reason to suspect that the prosecutors themselves were involved in the destruction of the photographs; indeed they made diligent efforts to find them. While we have warned that the government "flirts with the danger of reversal any time evidence is lost or inadvertently destroyed," *United States v. Heiden*, 508 F. 2d 898, 903 n. 1 (9th Cir. 1974), the government conduct here is substantially less egregious than that involved in *Heiden*.

In weighing the degree of prejudice a defendant has suffered by losing the evidence, a court may consider

> the centrality of the evidence to the case and its importance in establishing the elements of the crime or the motive or intent of the defendant; the probative value and reliability of the secondary or substitute evidence; the nature and probable weight of factual inferences or other demonstrations and kinds of proof allegedly lost to the accused; the probable effect on the jury from absence of the evidence, including dangers of unfounded speculation and bias that might result to the defendant if adequate presentation of the case requires explanation about the missing evidence.

United States v. Loud Hawk, *supra*, slip op. at 2872. The photographs sought by Tercero were neither central nor essential to his defense. With them he hoped to counter the government's corroboration of Florence's testimony that Tercero was wearing a white T-shirt and jeans on the night of his arrest.[2] But with one photograph of Tercero wearing such clothes already before the jury without defense objection, the addition of two more photographs, even if they showed Tercero wearing a coat, would have proved very little. The authenticity of the photograph that the government introduced was unquestioned. At most, the additional photographs might have proved that, at or after his arrest, Tercero had removed a coat or changed clothes. Moreover, Florence had already admitted on cross-examination that he had no independent recollection of the clothing Tercero was wearing that night.[3] Thus, not only were the photographs of remote substantive value, they also could serve no significant impeachment purposes. Tercero does not allege that the absence of the photographs hampered the testi-

mony of any defense witness or decreased the probative value of that testimony. Indeed, none of the defense witnesses testified as to what Tercero was wearing on the night of the arrest.

Tercero has thus failed in his burden of demonstrating any significant degree of prejudice to his defense. At the same time, it is recognized by both sides that the government's conduct was devoid of bad faith and was, at worst, negligent. While additional enlightenment by the government as to why the DEA pictures were missing would have been helpful, we conclude, on balance, that reversal of Tercero's conviction due to loss or destruction of the photographs is not warranted.

II.

Tercero was arrested on November 4, 1974, indicted on January 22, 1975, and the first trial commenced on July 13, 1976. The second trial took place on March 9, 10, and 13, 1978. Thus, the time between the indictment and the first trial was approximately 18 months. Tercero admits responsibility for this 18-month delay and does not claim that it violated the law. The time between the first and second trials was approximately 20 months. Tercero claims that this delay denied his constitutional right to a speedy trial and violated the Speedy Trial Act. 18 U.S.C. 3161 (e).

The right to a speedy trial "is as fundamental as any of the rights secured by the Sixth Amendment." *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967). The Supreme Court has identified four factors that courts must consider in deciding whether a defendant's right to speedy trial has been violated: the

length of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant from the delay. *Barker v. Wingo*, 407 U.S. 514, 530 (1972). We have followed this four-pronged analysis, *United States v. Graham*, 538 F. 2d 261, 263 (9th Cir.), *cert. denied*, 429 U.S. 925 (1976); *United States v. Simmons*, 536 F. 2d 827, 829 (9th Cir.), *cert. denied*, 429 U.S. 854 (1976), which "necessarily compels courts to approach speedy trial cases on an ad hoc basis." *Barker v. Wingo, supra*, 407 U.S. at 530.

The length of the delay, in addition to being crucial to the ultimate determination, is a triggering factor that initially causes the court to undertake the balancing analysis. *Id.* at 530; *United States v. Graham, supra*, 538 F. 2d at 263. The 20-month period between Tercero's first and second trials is clearly adequate, as the government concedes, to invoke the *Barker* balancing analysis, *Id.* at 263 (12-month delay); *United States v Simmons, supru*, 536 F. 2d at 830-31 (six-month delay).

Tercero's second trial was delayed pursuant to a stipulation entered into the government and Tercero's counsel to await the completion of another criminal prosecution of Tercero then pending in the district court of Minnesota. Such a delay is not the deliberate attempt to hamper the defense that the Supreme Court has said should be weighed heavily against the government. *Barker v. Wingo, supra*, 407 U.S. at 531. Still, it was not necessarily justified. Preparation for trial in both Minnesota and Arizona could have been undertaken at the same time. Compared to culpable government conduct intended to hamper the defense, the reason here "should (weigh) less

heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." 1d.

During the 20-month period between the first and second trials, Tercero never attempted to spur the government into action by asserting his right to a speedy trial. Under normal circumstances, such a failure to assert the right to a speedy trial would weigh heavily against him. *See 1d* at 532. In this case, however, there is uncontroverted evidence in the record that Tercero was unaware of the stipulation entered into by his counsel and the government and, in fact, that he never suspected he could be prosecuted again for the offense of November 4, 1974. Under such circumstances Tercero's failure to assert the right should not count in the balance against him. *1d.* at 528-29.

The final factor to be considered under the *Barker* analysis is the degree of prejudice to the defendant. Such prejudice must be considered in light of the interests that the speedy trial right was designed to protect: to prevent oppressive pretrial incarceration, to minimize anxiety and concern of the accused, and to limit the possibility that the defense will be impaired. *Barker v Wingo, supra*, 407 U.S. as 532. "Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." 1d. Only the latter two interests apply in this case because Tercero was not incarcerated during the period between the first and second trials.

Any impending criminal prosecution may "seriously interfere with the defendant's liberty, whether

he is free on bail or not,...disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *United States v. Marion,* 404 U.S. 307, 320 (1971). Tercero, however, does not claim that he suffered any of these anxieties or concerns during the 20-month interim. Indeed, for him to make this claim would be inconsistent with his assertion that, after the first trial, he never suspected that he would again be prosecuted for the events of November 4, 1974.

The ability to prepare an adequate defense, being the most important interest that may be prejudiced by delay of trial, warrants close examination by a reviewing court. Witnesses may die or disappear, their memories may fade, or evidence may be lost. Even upon close examination, however, Tercero has failed to show the the 20-month delay between the first and second trials caused any impairment. Every defense witness that testified at the first trial was present at the second trial and all testified then except for Tercero himself. The only time-caused lapse of memory identified by Tercero is irrelevant because it was sufferd by Florence, the key prosecution witness, and intended to undermine Florence's testimony concerning what Tercero wore on the night of his arrest. Indeed, the record indicates that the memories of crucial defense witnesses improved with time.[4] Tercero did not allege that the government's loss of the arrest photographs referred to above is attributable to the 20-month interim. Thus, Tercero has not identified any evidence, spoken or otherwise, that was not produced at the second trial simply because of the passage of time.

Weighing all of the *Barker* factors together, the only questionable conduct by the government that was a cause of the 20-month delay was to agree with Tercero's attorney to await the outcome of a separate trial in Minnesota. Tercero was not incarcerated, suffered no undue anxiety or concern during the delay, and was not rendered less able to present a defense. As Tercero suffered no impairment of any interest protected by the Sixth Amendment, it would be an affront to justice to reverse his conviction, vacate the sentence, and dismiss the indictment, the only remedy available when the Sixth Amendment right to a speedy trial has been violated. *Strunk v. United States*, 412 U.S. 434, 439-40 (1973), simply because the government may have acted somewhat improvidently.[5]

Finally, Tercero claims that the delay constituted a violation of the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.* That claim, however, is not properly before us because Tercero failed to raise it in the district court.[6] Fed. R. Crim. P. 12.

III.

During the second trial, Tercero requested that the district court rule in advance upon the admissibility, for impeachment purposes, of Tercero's prior narcotics convictions. In addition to referring the district court to the testimony that he had given at the prior trial, Tercero requested that the court hear his testimony outside of the presence of the jury to help determine whether he could properly be so impeached. Tercero's counsel also made an offer of proof that Tercero's testimony would be limited to his claim that he was not involved in the marijuana

transaction at issue. The district judge refused to make the advance ruling.

Tercero claims that the district court's refusal to rule chilled his constitutional right to testify and, therefore, unduly prejudiced his defense. In resolving this issue, we must answer two questions: whether the refusal to rule in advance was error, and, if so, whether such error was prejudicial.[7]

When, as here, the crime for which a defendant was previously convicted does not involve dishonesty or false statements, Federal Rule of Evidence 609 (a) requires a trial court to weigh the probative value of admitting the prior conviction into evidence against its prejudicial impact to the defendant. Because such a balancing analysis necessarily depends upon the myriad developments and circumstances of the trial, the decision as to when a ruling may most properly be made should be committed to the sound discretion of the trial judge. Those circuits which have considered this timing question agree, *United States v. Oakes,* 565 F. 2d 170, 173-74 (1st Cir. 1977); *United States v. Johnston,* 543 F. 2d 55, 59 (8th Cir. 1976); *United States v. Cox,* 428 F. 2d 683, 689 (7th Cir.), *cert. denied,* 400 U.S. 881 (1970); *United States v. Crisona,* 416 F. 2d 107, 117 (2d Cir. 1969), *cert. denied,* 397 U.S. 961 (1970), and we have agreed in dicta, *United States v. Cook,* No. 76-3465, slip op. at 2315 (9th Cir., June 1979) (en banc). *See Id.* at 2317 (Wallace, J., concurring).

In this case, however, we need not decide whether the district judge abused his discretion by refusing to rule in advance as to the admissibility of prior convictions. The record is clear that Tercero did not demonstrate, as he must, that he was prejudiced by

the ruling. *United States v. Cook*, *supra*, slip op. at 2318 (Wallace, J., concurring). To do so, Tercero must show that he would have testified but for the court's refusal to rule in advance. *Id.* This he cannot do. The record plainly reveals that even if the court had ruled in advance that the prior convictions were inadmissible, Tercero would not have testified due to the existence of a potential rebuttal witness, one who had previous drug dealings with Tercero.[8] Consequently, Tercero cannot claim injury as a result of the court's ruling. Even if there were error, it was not prejudicial.

AFFIRMED.

[1]Five judges joined Judge Kennedy's separate concurring opinion in *Loud Hawk* (six of the eleven judges sitting), which stated, at page 2873, footnote 3:

> In *United States v. Heiden*, 508 F. 2d 898 (9th Cir. 1974), a panel of this circuit stated that where evidence has been lost or destroyed the conviction will be reversed if the defendant can show "(1) bad faith or connivance on the part of the Government, or (2) that he was prejudiced by the loss of the evidence." As the discussion in *Heiden* demonstrates, "prejudice" as used there means serious impairment of the accused's ability to present his defense. In cases of severe prejudice the *Heiden* formulation would lead to the same result a under the test set forth in this case, and we think, therefore, that our holding here is not wholly inconsistent with *Heiden*. Whether or not the *Heiden* test can be reconciled with this case, however, it is the test set forth here and not the one in *Heiden* which should be deemed controlling in all future cases.

[2]Florence has testified on direct examination that the man who showed him the marijuana in the garage wore a white T-shirt and jeans, and that Tercero wore such clothes when arrested. He conceded on cross-examination, however, that his recollection of what Tercero was wearing was "influenced" by his recent review of the photograph taken immediately after Tercero's arrest, and that he could not say that he "honestly remembered what Tercero was wearing the night of the arrest without looking at that picture." On redirect examination, the government offered into evidence the photograph of Tercero wearing a white T-shirt and showed it to the jury.

[3]*See* note 2, *supra*

[4]Defense witness Vasquez testified at the first trial that he was not sure who agent Florence met at the front door of the house, that he did not remember who was in the garage with Florence, and that we was not sure whether Tercero was in the garage at the time of the arrest. At the second trial, however, Vasquez testified that he was positive that Florence met "Eddie" at the door, that he was "pretty certain" Tercero was not in the garage with Florence, and that "Juan," not Tercero, was in the garage at the time of the arrest.

Juan, another defense witness, testified at the second trial that the true drug dealers made good their escape when the lights were turned out. At the first trial, however, he made no mention of the lights going out. At the second trial he also added considerable detail concerning the commotion surrounding the arrest.

[5]Tercero further contends that the stipulation entered into by the government and his defense counsel was not binding upon him because he was not aware of his attorney's joining in the delay and did not personally sign the stipulation. Because the *Barker* analysis reveal no Sixth Amendment violation, however, we need not reach this question.

[6]The memorandum submitted by Tercero to the trial court in support of his motion to dismiss for violation of his right to a speedy trial relied solely upon the Sixth Amendment. Moreover,

the record shows that Tercero never mentioned the Speedy Trial Act, 18 U.S.C. § 1361 *et seq.*, in the district. court.

Tercero alternatively claims that the stipulation to continue the Arizona case pending the outcome of the Minnesota trial was violated when the second Arizona trial was set before completion of the Minnesota action without his consent. We conclude, however, that dismissal of the case in Minnesota was a sufficient completion to satisfy the wording of the stipulation.

[7]Pursuant to *United States v. Murray*, 492 F. 2d 178 (9th Cir. 1973), Tercero could not have raised on appeal his claim that the court erred in failing to rule on the admissibility of his prior conviction because he did not take the stand. We recently overturned *Murray*, however, in *United States v. Cook*, No. 76-3465 (9th Cir., June 29, 1979) (en banc).

[8]The following sidebar discussion occurred between Tercero's counsel and the court:

> MR. REMPE: I realize that. If I could just finish on the record I also would like to put in *I would not put Mr. Tercero (sic) on the stand if the Court is going to allow Mr. Platt to testify for the Government to show prior knowledge and intent or absent mistake as to prior drug dealings.* According to the trial memorandum Mr. Noyes provided to me he will call Mr. Platt to testify that Mr. Tecero (sic) had dealt marijuana with him and—
>
> THE COURT: Mr. Noyes is not required to tell you who he will call or what they will testify to. If he did that he was doing more than he had to. I don't know what he intends to do and until something comes before me I don't—I don't give rulings in anticipation of what somebody is going to do. I will rule when it is presented to me. There is nothing before me now.
>
> MR. REMPE: Well, based on the fact that I don't know what the Court would rule *I'm going to advise my client not to take the stand.*

(Emphasis added.)

The district court refused to rule in limine on the admissibility of Platt's testimony. Tercero does not now contest the propriety of that ruling. The record quoted above clearly demon-

strates that Tercero would not have testified regardless of how the district judge might have ruled on the admissibility of his prior convictions.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 78-1995

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ERNESTO TERCERO, DEFENDANT-APPELLANT

Aug. 4, 1980

AMENDMENT OF OPINION AND DENIAL OF REHEARING

Before GOODWIN and WALLACE, Circuit Judges, and HAUK,* District Judge.

The Opinion filed in the above matter on January 18, 1980, is amended as follows:

The last five sentences of footnote 8, beginning with the words "To counter the clear import" and ending with the words "admissibility of his prior convictions," are deleted.

The last full sentence of the Opinion, "Even if there were error, it was not prejudicial" is deleted, and the following is inserted in its place:

> To counter this effect of the potential rebuttal witness, Tercero argues in his reply brief that the threatened rebuttal testimony would have been inadmissible. This argument is not relevant to the issue before us. The record clearly indicates that Tercero would not have testified as long as the trial court refused to rule in advance on the admissibility of the rebuttal witness' testimony. Thus, the issue is not the admissibility of the rebuttal testimony, but rather the propriety of the trial

court's refusal to rule in advance on that admissibility. Tercero's reply brief only obscurely raises this issue, and cites no cases holding that such a refusal to rule is error. We conclude that is was not.

As already mentioned, the decision as to whether a court should rule upon the admissibility of prior conviction evidence in advance of the defendant's testimony rests within the sound discretion of the trial judge. *United States v. Cook*, *supra*, 608 F. 2d at 1187; *United States v. Oakes*, *supra*, 565 F. 2d at 173. *See also United States v. Evanchik*, *supra*, 413 F. 2d 950, 953 (2d Cir. 1969). If such is true as to prior-conviction impeachment evidence, *a fortiori* it is true as to rebuttal-witness impeachment evidence, the content and nature of which is less certain than that of a prior conviction.

In reviewing for abuse of discretion, "[t]he test is not what this court would have done under the same circumstances." *Bowles v. Quon*, 154 F. 2d 72, 73 (9th Cir. 1946). "An abuse of discretion is a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found." Id.

If admitted, the rebuttal witness testimony would have revealed Tercero's past involvement with marijuana sales. The rebuttal nature of this impeachment evidence depended largely upon the self-portrait that Tercero would attempt to paint before the jury. In explaining his reasons for refusing to rule in advance, the trial judge explained that he "would not give an advisory opinion as to what (he) would do until such time as (he) heard the testimony of whatever witness it was to be." Although Tercero's lawyer had avowed that Tercero's testimony would be limited to the testimony rendered by Tercero at his first trial, a transcript of which was before the district judge, the judge apparently felt incapable of rendering a decision as to the rebuttal testimony on the basis of the prior trial's transcript alone. In addition, the record indicates some uncertainty on the part of the district judge and Tercero's counsel as to whether the rebuttal witness would even testify. In view of these circumstances, we cannot say that the district judge's refusal to rule upon

> rebuttal-evidence admissibility before viewing Tercero's testimonial portrait was plain error, unjustified, or clearly illogical. We find no abuse of discretion.
>
> Because the district judge did not abuse his discretion in refusing to rule in advance upon the admissibility of the rebuttal witness' testimony, the fact remains that Tercero would not have taken the stand in his own defense even if the court had ruled in advance to exclude the evidence of Tercero's prior convictions. Therefore, Tercero cannot claim that he was prejudiced by the judge's refusal to rule on the admissibility of the prior convictions.

In footnote 1, a period is placed after the word "sitting)," and the remainder of the footnote is deleted.

The panel as contributed above has voted to deny the petition for rehearing and to reject the suggestion for rehearsal en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35 (b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

*Honorable A. Andrew Hauk, United States District Judge, Central District of California, sitting by designation.

APPENDIX C

(Whereupon, the following proceedings were had at the bench, in the presence but out of the hearing of the Jury.)

MR. REMPE: It would just be on the request to know whether if Mr. Tercero, Ernie Tercero testified he would testify as he testified in the previous proceeding. I don't know if the court has had an opportunity to read it.

THE COURT: I haven't.

MR. REMPE: Okay. But I would make an offer of proof that on the July 13th transcript in front of Judge Muecke that Mr. Ernie Tercero would testify to the same testimony as he made under oath at that time. I would inquire of the Court as to whether the Government would be allowed to impeach Mr. Tercero with his prior felony conviction of the sale of heroin.

THE COURT: I don't know what Mr. Tercero is going to testify to and I don't know that he is going to testify to the same thing that he testified to before. Until I heard what his testimony was I would be unable to exercise my discretion as to whether or not I would permit a prior felony conviction to be introduced as impeachment.

MR. REMPE: Well, if the Court would like I would as my offer of proof—

THE COURT: I can't make the decision without hearing the testimony.

MR. REMPE: Well, I can avow to the Court that he will testify to the same thing he testified the last time.

THE COURT: I didn't read it and I don't know

what he testified to.

MR. REMPE: Well, could I make an offer of proof as to what he testified and then the Court—I would like to have a hearing out of the presence of the Jury, he could testify under oath and then the Court can make a determination as to whether he could impeach him.

THE COURT: I am well aware of the Lukes case and I am well aware of the Gordon case and I am well aware of a 9th Circuit case that they wouldn't follow either one of them. And I'm well aware of the Rules of Evidence 609 and I know what it said and until I hear him get on the stand and testify about the whole business I don't know whether I would exercise my discretion and which way I would exercise it.

MR. REMPE: Well, could we have a brief recess so I can talk to my client?

THE COURT: You said you were ready for trial. I'm ready to hear it. I'm going to finish this case today if he is not going to testify. If he is going to testify we may not be able to finish. So you go back and ask him whether he wants to testify or not.

MR. REMPE: And would the same ruling be—I assume Mr. Noyes would be attempting be bring in Mr. Platt for rebuttal.

THE COURT: I have no idea what Mr. Noyes is going to do.

MR. REMPE: I realize that. If I could just finish on the record I also would like to put in I would not put Mr. Tercero on the stand if the Court is going to allow Mr. Platt to testify for the Government to show prior knowledge and intent or absent mistake as to prior drug dealings. According to the trial memo-

randum Mr. Noyes provided to me he will call Mr. Platt to testify that Mr. Tercero had dealt marijuana with him and—

THE COURT: Mr. Noyes is not required to tell you who he will call or what they will testify to. If he did that he was doing more than he had to. I don't know what he intends to do and until something comes before me I don't—I don't give rulings in anticipation of what somebody is going to do. I will rule when it is presented to me. There is nothing before me now.

MR. REMPE: Well, based on the fact that I don't know what the Court would rule I'm going to advise my client not to take the stand.

THE COURT: All right.

MR. REMPE: At this time we rest, Your Honor.